

**United States Bankruptcy Court
Western District of Wisconsin**

Cite as: [Unpublished]

**Simon Brothers and Walter B. Bowe, Plaintiffs, v.
Agri-Supply Cooperative, Defendant**

(In re Simon Brothers, Debtor)

Bankruptcy Case No. 88-00006-11, Adv. Case No. A91-1142-11

(In re Walter B. Bowe, Debtor)

Bankruptcy Case No. 90-03231-11, Adv. Case. No. A91-1142-11

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

November 25, 1991

L. R. Reinstra, for the plaintiffs.
Daniel R. Freund, for the defendant.

Thomas S. Utschig, United States Bankruptcy Judge.

**MEMORANDUM OPINION, FINDINGS OF FACT,
AND CONCLUSIONS OF LAW**

This matter comes before the Court on a motion for summary judgment by the plaintiffs, Simon Brothers and Walter Bowe. The plaintiffs are represented by L. R. Reinstra. The defendant is Agri-Supply Cooperative and it is represented by Daniel R. Freund.

The plaintiffs in this action each filed Chapter 11 bankruptcies -- Simon Brothers on January 4, 1988, and Walter Bowe on November 19, 1990. Both plaintiffs were members of the defendant Agri-Supply Cooperative (Agri-Supply) and were indebted to it -- Simon Brothers for approximately \$138,000 and Walter Bowe for approximately \$53,000. Agri-Supply ceased doing business in May of 1988 and filed a petition in state court for dissolution and liquidation on January 9, 1991. The plaintiffs assert an interest in net proceeds and/or assets of Agri-Supply.

The main issue before the Court is whether the defendant Agri-Supply may properly set off the plaintiffs' debts to it against its debt to them pursuant to 11 U.S.C. § 553. The parties had originally agreed at a telephone conference on September 5, 1991, to limit the present action to this matter alone. In its brief in opposition to the plaintiffs' summary judgment motion, however, the defendant raises the additional issue of lien rights. The defendant alleges that it has a lien in the plaintiffs' interest in Agri-Supply and that such lien survives bankruptcy. The plaintiffs deny the existence of a lien on their interest in Agri-Supply.

The Court has fully examined the issues raised by the parties and finds that both

the setoff issue and the lien issue are not properly before this Court at the present time. As the matter now stands, the aforementioned issues are prematurely before the Court. As to the setoff issue, the parties had requested that the Court assume there is a right to setoff under Wisconsin law. "[The bankruptcy setoff provision] limits the use of setoff rights already available under state law, but does not expand setoff rights to encompass rights that do not otherwise exist under state law." Express Freight Lines, Inc. v. Kelly (In re Express Freight Lines, Inc.), 130 B.R. 288, 290 (Bankr. E.D. Wis. 1991), citing with approval Boston and Maine Corp. v. Chicago Pacific Corp., 785 F.2d 562, 565 (7th Cir. 1986). Thus, if no setoff right exists under Wisconsin law in this case, there would be no issue of whether setoff is proper pursuant to § 553 of the Bankruptcy Code. The issue of setoff rights under state law is therefore potentially dispositive of this issue. Given that fact and the consideration that the state-law setoff issue is a proper one for state court consideration, this Court declines to consider this issue. In the interest of comity with state courts, the Court chooses to exercise its right of discretionary abstention. See 28 U.S.C. § 1334(c)(1) (West 1991)

As to the lien issue, the defendant asks the Court to assume for purposes of the cause before it that the defendant has a lien on the plaintiff's interest in the Agri-Supply Cooperative. See Brief in Opposition to Plaintiffs' "Motion for Summary Judgment" at 2. The defendant then states that "[w]hether or not there is such a lien would be, as in the case of set off rights, left to state court." Id. The plaintiffs, as noted, dispute the existence of any lien. Whether the language in defendant Agri-Supply's bylaws is sufficient to grant it a lien under Wisconsin law is a proper matter for state court determination. As with the setoff issue, if the state court were to find no lien on the part of Agri-Supply, then there would be no lien issue for this Court to decide. The Court therefore decides to abstain as to this issue as well pursuant to 28 U.S.C. § 1334.

If the state court does ultimately determine that either (or both) a setoff right or a lien exists under state law, then the parties could return to this Court for a determination as to the effect of the bankruptcy on that setoff right or lien. If the state court decides that neither exists, then the matter ends there.

Accordingly, the plaintiffs' motion for summary judgment is denied, and the Court grants defendant's motion to abstain, pending further decision by the state court as to the existence of a right of setoff and the existence of lien rights, if any.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.